Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

JAY EL WILBURN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Court of Appeals decisions, and has departed from the accepted and usual course of judicial proceedings, thereby calling for the exercise of the Supreme Court's supervisory power.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit.

1. JAY EL WILBURN,
Defendant/Appellant/Petitioner;

2. UNITED STATES OF AMERICA,
Plaintiff/Appellee/Respondent.

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As to the denial of Petitioner's Petition For Rehearing, there are no other reports or opinions, other than the Eleventh Circuit's Opinion, which can be found in the Appendix, beginning at App.1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgment of the United States Court of Appeals for the Eleventh Circuit, dated and entered on July 26, 1999, and the subsequent Mandate, issued on August 24, 1999, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part the general rule is that where there is claimed a potential for a **Bruton** error the trial court would sever defendants pursuant to Federal Rules of Criminal Procedure Rule 14. **Bruton v. United States**, 391 U.S. 123, 137 (1968). FRCP Rule 8(b) permits joinder of defendants in the same indictment where the defendants are alleged to have participated in the same act or in the same series of acts constituting an offense or offenses. **United States v. McLain**, 823 F.2d 1457 (11th Cir. 1987). Under

Rule 14 a trial judge may sever offenders properly joined which demonstrates prejudice before or during trial. See **Zafiro v. United States**, 506 U.S. 534 (1993). In **Zafiro**, the Supreme Court held that severance should be granted, "...if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." Id. at 534, and **United States v. Schlei**, 122 F.3d 944 (11th Cir. 1997) (denial of severance upheld where much of evidence at trial applicable only to co-defendants because potential prejudice avoided by jury instructions), cert. denied. 118 S.Ct. 1523 (1998). Where conflicts in defenses between co-defendants reach degree of antagonism required to satisfy **Zafiro**, denial of severance by the trial court is abuse of discretion where evidence of co-defendant's admitted criminal conduct "spills over" on defendant, and if tried separately would not taint or discredit defendant's defense. Also where denial of severance caused irreparable harm and could not be overcome by jury instructions, reversal is required. See **United States v. Fisher**, 106 F.3d 622, 632 (5th Cir. 1997), and **United States v. Costa**, 31 F.3d 1073, 1076 (11th Cir. 1994) (severance proper when government sought to introduce custodial confession of non-testifying co-defendant incriminating defendant and co-defendant because limiting instruction would be ineffective to prevent violation of defendant's rights of confrontation and cross examination. The trial court and the Eleventh Circuit Court of Appeals erred when they held, that the **Bruton** error was not prejudicial where defendant did not demonstrate the prejudice necessary for severance under Rule 14. C.f. **United State v. Rucker**, 915 F.2d 1511, 1513 (11th Cir. 1990) (denial of severance abuse of discretion where two co-defendants asserted ignorance of narcotic found in common automobile where they were the only occupants

and where each claimed narcotic must belong to the other).

STATEMENT OF THE CASE

Petitioner was named in three counts of a four count indictment in the Middle District of Florida, Tampa Division, on September 11, 1997. Count One charged, Petitioner (hereinafter **Wilburn**) and his co-defendant with the intent to cause death and serious bodily harm, that they took a motor vehicle by force, in violation of Title 18 U.S.C. § 2119, and Count Three charged, that on August 11, 1997, **Wilburn** and his co-defendant took a motor vehicle by force, with the intent to cause death and bodily harm, in violation of Title 18 U.S.C. § 2119, and in Count Four, that **Wilburn** knowingly used a firearm in relation to a crime of violence, namely carjacking, in violation of Title 18 U.S.C. Section 924(c). **Wilburn** was arrested by Lee County, Florida authorities on August 12, 1997, and remanded to federal custody on October 10, 1997. **Wilburn** appeared before the Magistrate Judge on that same day for his initial appearance and arraignment, at which time the Magistrate issued a temporary detention order as to **Wilburn**. On October 24, 1997, the Magistrate Judge ordered **Wilburn** detained. **Wilburn's** trial commenced on January 12, 1998, before the Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, Tampa Division. On January 14, 1998, **Wilburn** was found guilty by jury verdict of Counts One, Three, and Four, as charged in the indictment. Sentencing was held on April 14, 1998, at which time **Wilburn** was sentenced to 168 months imprisonment as to Counts One and Three, to run concurrent, and sixty months as to Count Four to run consecutive to Counts One and Three, to be followed by 60 months supervised release, and

a special assessment of $300.00. **Wilburn** was thereafter remanded to the custody of the United States Marshal Service, for transfer to the Federal Bureau of Prisons. **Wilburn** is currently incarcerated in the Federal Correctional Institution Coleman, Coleman, Florida, where he is serving an aggregate term of imprisonment of 228 months. A timely Notice of Appeal was filed as to **Wilburn's** conviction and sentence on April 22, 1998, resulting in a per curiam opinion affirming the conviction and sentence on all counts. A Petition for Rehearing was timely filed on August 11, 1999, which was denied on August 24, 1999, by the Eleventh Circuit Court of Appeals.

The issues on appeal presented to the Eleventh Circuit were:

ISSUE I
WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED WILBURN'S MOTION FOR MISTRIAL IN RECOGNITION OF A "BRUTON" ERROR.

ISSUE II
WHETHER THE DISTRICT COURT ERRED WHEN IT HELD WILBURN RESPONSIBLE FOR UNFORESEEABLE RELEVANT CONDUCT IN COUNT ONE, SPECIFICALLY CO-DEFENDANT'S USE OF A WEAPON DURING THE COURSE OF A CARJACKING.

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ARGUMENT

The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Courts of Appeals, and has departed from the accepted standard addressing the application of the Bruton Rule, where prejudice was sufficient under Rule 14 to require severance.

Wilburn asserts, that the Eleventh Circuit Court of Appeals, and the district trial court erred by failing to recognize the prejudice and abuse of discretion, where petitioner was not granted a motion for severance in recognition of **Bruton**. Had there been a separate trial the co-defendant would have testified in **Wilburn's** behalf; that **Wilburn** had no foreseeability, knowledge, participation, or intent therein during the co-defendant's carjacking in violation of Title 18 U.S.C. § 2119, "...that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm to kill the driver if necessary to steal the car (or, alternatively if unnecessary to steal the car). " **Holloway v. United States**, 119 S.Ct. 966; 143 L. E.d. 2d 1 (1999).

Trial counsel for petitioner filed a Motion To Sever under the provisions of FRCP Rule 14, and in pertinent part presented the argument for severance in recognition of the following:

As a result of being charged with the co-defendant

Mr. Wilburn's Fifth Amendment rights of due process and Sixth Amendment right to confront witnesses against him are violated. Mr. Wilburn believes that if he had a separate trial, his co-defendant would testify on his behalf. Mr. Wilburn has no Sixth Amendment compulsory process over the individual in the present situation as co-defendant and therefore cannot force him to testify. Each defendant has a Fifth Amendment Right not to incriminate himself and may exercise this right in trial. As joint trial severely limits Mr. Wilburn's potential witnesses and in turn critically diminishes his defense. In support of severance Mr. Wilburn has a firm belief that the co-defendant has made exculpatory statements as to Wilburn to law enforcement. It is Mr. Wilburn's belief that were Mr. Hatcher able to testify without incriminating himself at his own trial, that Hatcher would offer even more favorable evidence on Mr. Wilburn's behalf. Mr. Wilburn's Fifth Amendment right to due process is violated by his inability to call Hatcher. All notions of fundamental fairness are violated when Mr. Wilburn's potentially exculpatory witnesses is not able to testify on Mr. Wilburn's behalf. This inability to call witnesses is so prejudicial it outweighs the concerns of judicial economy ... it appears that the government's case against Mr. Wilburn consists of testimony that Mr. Wilburn was involved in carjackings. If Mr. Wilburn was permitted to call Mr. Hatcher [co-defendant] to testify, Mr. Hatcher's testimony could be exculpatory in that it appears he would state that Mr. Wilburn did not know of a plan to take a vehicle(s) or took no part in taking a vehicle(s). There is a bona fide need for Mr. Hatcher's testimony because there are apparently government witnesses claiming Mr. Wilburn was involved in these offenses. The government does not appear to have any evidence that Mr. Wilburn intentionally committed these offenses, making Mr. Hatcher's testimony both exculpatory and imperative. Defendant Wilburn

believes Mr. Hatcher would testify for Mr. Wilburn were he not facing charges himself in a joint trial. [Motion For Severance, November 13, 1997].

The evidence presented in the record supported petitioner's position that had he been granted a severance, that co-defendant Hatcher would have (and did post-trial) corroborate **Wilburn's** lack of criminal intent, specific, general, or conditional under **Holloway**.

Petitioner raised on appeal a **Bruton** error, where the district trial court and the Eleventh Circuit Court of Appeals failed to recognize that it was error when the district court denied **Wilburn's** motion for mistrial in recognition of **Bruton**.

Petitioner presents that the district court erred when, it denied **Wilburn's** motion for mistrial in recognition of a **Bruton** violation, where **Wilburn's** counsel during trial on January 12, 1998, made an oral motion for mistrial. See **Bruton**, supra. In **Bruton**, the Supreme Court held, that a defendant's Sixth Amendment right of confrontation is violated when an unredacted, facially incriminating confession of a nontestifying co-defendant is introduced at a joint trial, even if the jury is given a limiting instruction to consider the confession only against the co-defendant. See **Bruton**, 391 U.S. at 126. We assert that the constitutional violation is triggered because if the declarant is unavailable the "powerfully incriminating extrajudcical statements of a co-defendant who stands accused side by side with the defendant," cannot be tested by cross-examination. **Bruton**, 391 U.S. at 135.

The Supreme Court limited the reach of **Bruton**, concluding that when the statement is, "not incriminating on

its face," but became, "so only when linked with evidence introduced later at trial," the statement need not be excluded provided it is, "redacted to eliminate not only the defendant's name, but any reference to his or her existence," and the jury is given a proper limiting instruction. The Eleventh Circuit held, in **United States v. Mendoza-Cecelia**, 963 F.2d 1467 (11th Cir.) cert. denied, 113 S.Ct. 436 (1992), if the co-defendant's statement makes no reference to the defendant's name, but still discusses his existence that **Bruton**, is violated where, "...the jury would logically conclude from the other evidence in the record that the neutral pronoun or general word indeed represented the defendant." We submit, that the use in evidence of the pronoun "***they***" would be understood by the jury as "clearly referring" to **Wilburn** in light of the government's opening and closing statements. See **United States v. Bennett**, 848 F.2d 1134, 1141 (11th Cir. 1988) (pronoun "they" in redacted statement understood by jury as clearly referring to defendants in light of prosecutor's closing argument).

Wilburn's counsel filed a motion for severance on November 13, 1997, where both defendants provided incriminating statements which were to be used against them in trial, and which was denied on December 17, 1997. During the course of the trial an investigating police officer referred to "they" on several occasions, referencing **Wilburn** and his co-defendant's inculpating statements, regarding marihuana use, where the marihuana was the marihuana that was in the Ford Probe automobile which was carjacked.

The government on direct asked the witness detective:

Q. Okay. What did he say that indicated that he used the stuff, "he" being Mr. Wilburn?

A. That ***they*** got a high from the stuff.
THE COURT: All right, just hold on a minute. Let me send the jury out, please...okay now Detective, Ms. Cox has said she talked [to] you about this, so I hope we don't have this problem, because if you keep using the word "they," its going to result in a mistrial.

Additionally, with respect to co-defendant Hatcher's statements the police officer testified, that Hatcher's interview was taped-recorded, that he was provided his Miranda rights, and with respect to Ingram's carjacking and a ATM robbery:
Q. Okay. And at that time did you speak with Mr. Raymond [Hatcher] about, uh, the incident that involved the ATM machine, uh, what -- Mr. Ingram's, carjacking?
A. Yes.
Q. And, uh, what did he tell you?
A. ***They*** **went to the – near the ATM machine; that he hid in the bushes until someone came by**. (Emphasis added).
MR. MARZULLO: Objection, Your Honor, move to strike.
THE COURT: Okay.

Ladies and Gentlemen, again this detective has used the pronoun "they", and I would ask you to disregard the use of the pronoun "they." Any statement that may have been made by Mr. Hatcher can be used and considered by you as to Mr. Hatcher, but ***they*** cannot be used as evidence against Mr. Wilburn, the co-defendant in this case. So, I will ask you to disregard the pronoun. Sometimes I think pronouns are used interchangeably without thinking.

Thereafter, **Wilburn's** counsel moved for a mistrial, with respect to a **Bruton** error, which was denied by the Court. Additionally, **Wilburn's** counsel renewed an oral

motion in open court for mistrial on January 13, 1998, which was denied.

Wilburn propositions, that he was prejudiced by the **Bruton** violation, where his co-defendant's confession was directly inculpatory, and was powerfully incriminating against him. **Bruton**. supra. at 135, and **United States v. Beal**, 921 F.2d 1412, 1425 (11th Cir.) cert. denied, 502 U.S. 829 n.10 (1991).

Prior to trial **Wilburn's** counsel was successful in filing a motion in limine as to statements made by **Wilburn** to law enforcement officials. Petitioner contends, that the reference by the investigating police officer that "***they***" as applied with respect to the ATM robbery of Ingram and the carjacking of his Ford Probe vehicle warranted a mistrial in recognition of a **Bruton** violation. See **United States v. Vanhemelryck**, 945 F.2d 1493, 1501 (11th Cir. 1991) (finding such compelled inference where, "the record ... presents no person other than [the defendant] who could have been the man of [co-defendant's] statement..."); **Bennett**, supra. at 1141 (pronoun "***they***" in redacted statement understood by jury as "clearly referring" to defendant in light of prosecutor's closing argument); **United States v. Petit**, 841 F.2d 1546, (11th Cir.) cert. denied, 487 U.S. 1237 (1988) (reference to "friend," "when considered with the other evidence, could reasonably be understood only as referring to [defendant]"), and **United States v. Pendegraph**, 791 F. 2d 1462, 1465 (11th Cir.) cert. denied, 479 U.S. 869 (1986) (the jury could very easily infer [defendant] to be the "individual" referred to in [co-defendant's] confession, if only because there was no other possibility).

In **Bruton**, that Court held, that the confession of a

nontestifying co-defendant which inculpated another defendant was inadmissible at their joint trial, "Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [**Bruton's**] guilt." Admission of the co-defendant's confession impermissibly abridged the protections afforded to the incriminated defendant by the Sixth Amendment's Confrontation Clause. **Bruton**, at 126. For **Bruton** to apply to a co-defendant's statement it must be clearly inculpatory standing alone. See **United States v. Satterfield**, 743 F.2d 827, 849 (11th Cir.) cert. denied, 471 U.S. 1117 (1985). **Wilburn** contends, that the introduction of Hatcher's (co-defendant's) confession constituted reversible error under **Bruton**, and it was clear error for the court not to grant **Wilburn's** motion for mistrial. See **Petit**, supra., at 1556.

Petitioner further contends that the Federal District Court erred when it failed to grant severance under Rule 14, in recognition of pretrial motions, which demonstrated that co-defendant Hatcher would testify in petitioner's behalf, lack of culpability or that **Wilburn** had guilty knowledge of intent to, "...cause death or serious bodily harm" as required by the carjacking statute, Title 18 U.S.C. § 2119. Additionally, this premise is buttressed by the fact that the government had investigatory statements and evidence that would conflict with the **Bruton** rule. Under Rule 14 the trial judge has broad discretion to grant or deny severance of the joined defendants after balancing the interest in judicial economy against the risk of prejudice to the defendant. See **United States v. Francis**, 131 F.3d 1452, 1459 (11th Cir.) cert. denied, 119 S.Ct. 454 (1998) (trial court must balance benefit of judicial economy from joint trial against resultant potential prejudice). See **United States v. Johnson**, 130 F.3d 1420, 1427 (11th Cir.) cert.

denied, 119 S.Ct. 78 (1998). Petitioner asserts that the trial court's denial of severance was an abuse of discretion and that the Eleventh Circuit Court of Appeals committed clear error when it affirmed **Wilburn's** conviction and sentnece, in recognition of **Bruton**, supra. **Wilburn** clearly demonstrated the prejudice necessary for severance under Rule 14, where co-defendant Hatcher would have testified as to **Wilburn's** actual innocence, regarding intent as prescribed in the Motor Vehicle "Carjacking" Eleventh Circuit Pattern Jury Instruction, Title 18 U.S.C. § 2119, Section 63, which states in relevant part, "Title 18, United States Code, Section 2119, makes it a federal crime or offense for anyone to take or attempt to take a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another, [by force and violence] [by intimidation] with *the intent to cause death or serious bodily harm.*

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt ... That the Defendant intended to cause death or serious bodily harm when the defendant took the motor vehicle. ... Whether the Defendant "intended to cause death or serious bodily harm" is to be judged objectively from the conduct of the Defendant as disclosed by the evidence and from what one in the position of the alleged victim might reasonably conclude."

Wilburn contends that during the course of the trial sufficient prejudice arose necessary for severance under Rule 14 as a result of the **Bruton** violation. **Wilburn** argues that prejudice resulted not only from his co-defendant's refusal to present exculpatory testimony during the joint trial due to potential self-incrimination, but also the court was confronted with an obvious **Bruton** violation

during the trial and should have sua sponte granted a severance. See **United States v. Lane**, 474 U.S. 438, 449 n. 12 (1986), and **Rucker**, supra. at 1513. C.f. **United States v. Talley**, 108 F.3d 277, 280 (11th Cir. 1997) (per curiam).

The introduction of a co-defendant's extra judicial confession that incriminates the defendant, even when introduced only against the co-defendant violates the rule announced in **Bruton**. A **Bruton** violation exists even where admissions of a co-defendant's confession exists which was redacted by blacking out the names except that of the confessing party was found to be error, since the given redaction left clear reference to the co-defendant's involvement in crimes that were the subject of the confession. See **United States v. Costa**, 31 F.3d 1073, 1076 (11th Cir. 1994) (**Bruton** error when government sought to introduce custodial confession of non-testifying co-defendant that incriminated defendant and co-defendant where limiting instruction ineffective to prevent violation of defendant's rights of confrontation and cross examination). C.f. **Schlei**, at 984.

Wilburn suggests that both the trial court and the Eleventh Circuit Court of Appeals erred when they upheld his conviction and sentence, in recognition of **Zafiro**, supra., which presented, "...if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgement about guilt or innocence"...severance should be granted. Id. at 534, and **Costa**. at 1076.

Wilburn asserts that under Rule 14 the court's failure to sever was an abuse of discretion resulting in severe and compelling prejudice. The Eleventh Circuit Court of

Appeals when considering an issue raising severance and the application of Rule 8 considers the "...substantial and injurious effect.." standard to a Rule 14 motion to sever, where as a matter of law joinder is incorrect because the single conspiracy charge that originally justified joinder was unsupported by the evidence at trial. See **United States v. Fernandez**, 892 F.2d 976, 989 (11th Cir. 1989) ("spillover" of direct evidence from co-defendant to defendant, against whom only circumstantial evidence presented, had "...substantial and injurious..." effect on jury's verdict, warranting severance). Also see **United States v. Vue**, 13 F.3d 1206, 1210 (8th Cir. 1984) (severance justified when defendant deprived of appreciable chance that he would not have been convicted in separate trial).

The Sixth Amendment of the Constitution Confrontation Clause provides a criminal defendant the right to encounter and cross examine a witness to test both the witness' credibility and the witness' knowledge of the facts bearing on the defendant's guilt or innocence. Where the court fails to grant a severance the defendant is denied his constitutional due process right to exercise the Confrontation Clause of the Sixth Amendment to the Constitution. Where it is asserted that co-defendant Hatcher could/would provide exculpatory evidence in **Wilburn's** behalf, the Confrontation Clause is violated. **Wilburn** contends that had he been severed from Hatcher's trial he would have had an opportunity to cross examine Hatcher's testimony in respect to the charges under Title 18 U.S.C. § 2119, with respect to **Wilburn's** foreseeable intent, specific, general, or unconditional. **Wilburn** was denied this due process right as a result of the trial court's failure to sever. A violation of the Confrontation Clause is subject to harmless error analysis by the Court of Appeals, and **Wilburn** asserts that the violation contributed to the verdict

"beyond a reasonable doubt." **Wilburn** maintains that the evidence against him with respect to intent was not overwhelming and that the error was not harmless beyond a reasonable doubt. Hatcher's unavailability to testify in **Wilburn's** behalf as to his actual innocence had substantial injurious effect, and influence on the jury's verdict.

In summary **Wilburn** maintains, that the district court's decision not to grant a mistrial was clear error. A **Bruton** violation occurred and the district court's curative instruction was insufficient to address the problem. The **Bruton** violation statement was facially incriminating and linked Hatcher's confession to the ATM robbery with **Wilburn's** involvement where the police officer referred to the incident as "they" instead of "he" [Hatcher]. See **Richardson v. Marsh**, 481 U.S. 200 (1987) ("...where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence). In the case at bar we contend, that the linkage was direct, where the use of "they" in Hatcher's confession included and only included **Wilburn,** and therefore we present, that the jury even with contemporaneous corrective instructions would not likely obey the instruction to disregard the evidence. See **United States v. Key**, 725 F.2d 1123 (7th Cir. 1984) (**Bruton** violation existed because co-defendant's confession linked defendant to criminal conduct).

Confessions of a co-defendant who exercises his Fifth Amendment right not to testify in trial is not admissible because the defendant has no opportunity to cross-examine. In **Bruton** supra., the Supreme Court held that the admission of a co-defendant's confession during a joint trial violates the defendant's right to confrontation if the confession also incriminates the defendant. The violation of **Bruton** occurs where the co-defendant's

confession is considered by a jury inculpating the defendant. See **Cruz v. New York**, 481 U.S. 186, 193 (1987) (Confrontation Clause violated when court admitted non-testifying co-defendant's confession even though defendant's own confession properly admitted and substantially the same as that of a co-defendant); **Samuels v. Mann**, 13 F.3d 1522, 1526 (2nd Cir. 1993) (Confrontation Clause violated when non-testifying co-defendant's confession admitted even where the judge instructed the jury not to consider it as evidence against the defendant).

Accordingly, in recognition of the above arguments we urge that this Honorable Court to approve **Wilburn's** application for Certiorari.

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CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for Certiorari.

This case presents serious due process issues concerning statutory considerations as well as this Honorable Court's prior decisions, with respect to severance and **Bruton** concerns.

Respectfully Submitted,

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APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2521-bb

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JAY EL WILBURN, a.k.a. Jay,

Defendant - Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

Before: DUBINA and HULL, Circuit Judges, and O'Kelly, Honorable William C. O'Kelly, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Jay El Wilburn, is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

FILED

August 24, 1999

App. 2

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

98-2521

D.C. Docket No. 97-367-CR-T-24(E)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KAREEM RASHEED HATCHER, a.k.a. Kareem Rasheed Raymond
JAY EL WILBURN, a.k.a. Jay,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(July 22, 1999)

Before DUBINA and HULL, Circuit Judges, and O'KELLY, Senior District Judge, Honorable William O'Kelly, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

Appellants Kareem Rasheed Hatcher ("Hatcher") and Jay El Wilburn ("Wilburn") appeal their convictions and sentences for carjacking in violation 18 U.S.C. §2119 and use of a firearm during a crime of violence in violation of 18 U.S.C. §924(c). Both Hatcher and Wilburn were sentenced to 168 months imprisonment for the carjacking offenses. plus 60 months imprisonment to run consecutively on the firearm offense.

On appeal, Hatcher raises three issues: (1) whether there was sufficient evidence of the intent necessary for a conviction for carjacking under 18 U.S.C. §2119; (2) whether Hatcher's sentence exceeds the fifteen-year statutory maximum sentence under §2119(1) of the carjacking statute; and (3) whether the district court erred in denying Hatcher a downward departure for acceptance of responsibility under the United States

Sentencing Guidelines § 3E1.1. Wilburn raises two issues: (1) whether he was prejudiced by a Bruton error; and (2) whether Hatcher's use of a weapon was foreseeable and therefore attributable to Wilburn for sentences purposes.

After reviewing the record and having the benefit of oral argument by counsel for all parties, we summarily affirm Hatcher's and Wilburn's convictions and sentences. See 11th Cir.R. 36-1.

Only one issue merits discussion. After the district sentenced Appellants, the Supreme Court addressed the higher twenty-five and life penalties in §§ 2119(2) and 2119(3) of the carjacking statute which may apply when the carjacking actually results in serious bodily injury or death. Jones v. United States, _U.S.__, 199 S. Ct. 1215 (1999). In Jones, the defendant was sentenced to the statutory maximum of twenty-five years under § 2119(2)

because the court found at sentencing that one of the victims had suffered serious bodily injury. Both the trial and appellate court had read §2119(2) as a sentencing factor and not as setting out an element of an independent offense. Reversing the defendant's twenty-five year sentence, the Supreme Court held that §§2119(2) and 2119(3) set forth an additional element of the offense, not mere sentencing consideration. ___U.S._ _, 199 S.Ct. at 1228.

We conclude that Jones does not affect Hatcher's sentence here because no increased penalty was imposed under either §2119(2) (increasing the penalty to twenty-five years for serious bodily injury to a victim) or §2119(3) (increasing the penalty to life for death). Instead Hatcher's sentence of 169 months or fourteen years was calculated based on the guidelines and fell below the fifteen-year statutory maximum for the basic

offense of carjacking with intent to cause serious bodily injury. The fact that the guideline range of 158 to 188 months for Hatcher included a high end of 188 months-or-eight months over the fifteen year statutory maximum-created no error as the district court actually sentenced Hatcher to only 168 months-a fourteen-year sentence. Within that guideline range, the district court also expressly stated that it imposed the 168 month's sentence for Hatcher in order to match his co-defendant Wilburn's sentence of 168 months.

We also conclude that there is no violation of the fifteen-year statutory maximum for carjacking in §2119 when a §924(c) firearm offense runs consecutively as §924(c) punishes a separate, distinct offense.

AFFIRMED.

App. 7

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

United States of America

JUDGMENT IN A CRIMINAL CASE
Case Number: 97-367-CR-T-24(E)

vs.

JAY EL WILBURN Defendant's Attorney: Landon Miller, Esq.

THE DEFENDANT:

X was found guilty on counts One, Three and Four of the indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded
18 U.S.C. 2119	Carjacking	08/11/1997
18 U.S.C. 924(c)	Use of a firearm during during a crime of violence	08/09/1997

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

_ The defendant has been found not guilty on count(s)

_ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 265-95-3029

Defendant's Date of Birth: December 28, 1978

Date of Imposition of Sentence: April 14, 1998

Defendant's USM No: 22130-018

Defendant's Mailing Address: C/O U.S. Marshal

Defendant's Residence Address: C/O U.S. Marshal

Signature of Judicial Officer

Date: April 14, 1998

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED AND SIXTY-EIGHT (168) MONTHS as to Counts One and Three of the indictment, to run concurrent to each other AND SIXTY (60) MONTHS as to Count Four of the Indictment, to run consecutive to the sentence imposed in Counts One and Three. Total amount of sentence is TWO HUNDRED AND TWENTY-EIGHT (228) MONTHS.

_X_ The court makes the following recommendations to the Bureau of Prisons:

Defendant participate in a drug treatment program while serving term of imprisonment and if eligible, serve term at the Coleman facility.

_X_ The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States Marshal for this district:
_ at ___a.m./p.m. on ____.

___ as notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on_____
_ as notified by the United States Marshal
_as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____ Defendant delivered on _____ to _____

___ with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy Marshal

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THIRTY-SIX (36) MONTHS as to Counts One, Three and Four of the Indictment, to run concurrent to each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. §921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

_ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) **the defendant shall not leave the judicial district without permission of the court or probation officer;**

2) **the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;**

3) **the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;**

4) **the defendant shall support his or her dependents and meet other family responsibilities;**

5) **the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;**

6) **the defendant shall notify the probation officer ten days prior to any change in residence or employment;**

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance.

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by probation officer:

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

X The defendant shall participate as directed in a program approved by the Probation Officer for treatment of narcotic addiction of drug or alcohol dependency which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment option on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

Assessment	Fine	Total Restitution
Totals: $300.00	Waived	$ 41,710.67

RESTITUTION

X The defendant shall make restitution to the following victims in the amounts listed below:

X Restitution is ordered jointly and severally with: Co-Defendant Kareem Hatcher

Name of Payee	Total Amount of Loss	Restitution Ordered	Priority Order or Percentage of Payment
Tampa General Hosp. P.O. Box 3275 Tampa, Florida 33601 Re: 61-97-6796	$37,259.00	$37,259.00	
Carlos Perez 203 Limona Road Brandon, Florida 33510	$2,750.00	$2,750.00	
Medicaid P.O. Box 12900 Tallahassee, Florida 32317-2900 Re: Cesar Rodriguez	$1,710.67	$1,710.67	
Totals:	$41,710.67	$41,710.67	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal restitution (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. X in full

A. X due immediately

B. ___ On or before ___

II. ____ In installments

A. _ monthly in installments of $ over a period of _ months, to commence _ days after date of this judgment.

B. _ In _ installments of $ over a period of _ commence _ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties to 18 U.S.C. §3664(f)(3)(A).

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

Defendant: JAY EL WILBURN
Case No.: 97-367-CR-T-24(E)

STATEMENT OF REASONS

__ The court adopts the factual findings and guideline application in the presentence report.

OR

_X_ The Court adopts the factual finds and guideline application in the presentence report except: The Court finds the victim injury as to Ryan Ingram warrants a three level adjustment rather than a four level adjustment in the presentence report.

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 35

Criminal History Category: 1

Imprisonment Range: 168 to 210 months (plus 60 months consecutive as to Court Four)

Supervised Release Range: 3 to 5 years

Fine Range: $20,00 to $200,000

X Fine is waived or below the guideline range because of inability to pay.

Restitution: $41,610.67

_ The court finds pursuant to 18 U.S.C. §3664(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

_ Restitution is not ordered because:

_ the defendant was convicted of a qualifying offense under 18 U.S.C. §3663(a)(1)(A) and the court has considered the factors enumerated in 18 U.S.C. §3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

_ the defendant was convicted of a qualifying offense under 18

U.S.C. §3663(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. §3663(a)(1)(B)(i), pursuant to 18 U.S.C. §3663(a)(1)(B)(ii), it has been determined that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

_ the defendant was convicted of a qualifying offense under 18 U.S.C. §3663A (c)((1)(A)(ii) and, pursuant to 18 U.S.C. §3663A (c)(3)(A), the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

_ the defendant was convicted of a qualifying offense under 18 U.S.C. §3663A (c)(1)(ii) and, pursuant to 18 U.S.C. §3663A (c)(3)(B), the court finds from facts on the records that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the

sentencing process to degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

X The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s): The defendant is sentenced at the low end of guideline range as a sentence of that duration appears adequate to meet the statutory purposes of sentencing.

OR

The sentence departs from the guideline range:

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reasons(s):